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# ‘Respect for Religious Feelings’: As the Italian Case Shows, Fresh Paint Can’t Fix the Crumbling Wall of Blasphemy

Tommaso VIRGILI<sup>\*</sup>

*This article examines the relation between free speech and blasphemy laws and assesses whether the latter may still have a place in secular, liberal democracies. After a theoretical introduction on free speech, its function in a liberal society and the possible grounds for restrictions, the analysis will focus on Italy – prototypical case of a country that has experimented with diverse ways of outlawing blasphemy. The article argues that blasphemy laws, even when wrapped in the new clothes of the ‘protection for religious feelings’, perpetuate a favour toward institutionalized religions that is hardly justifiable today from a constitutional or even logical perspective. The privilege enjoyed by stronger religious denominations, the discrimination between different expressions of individual conscience, the chilling effect on free speech in the name of dogmas – these are all issues of serious concern inextricably linked to blasphemy laws that are intolerable in secular, liberal democratic societies.*

**Keywords:** blasphemy, free speech, freedom of expression, religious feelings, religious sensibilities, freedom of religion, Italy

## 1 INTRODUCTION

The freedom to express one’s own ideas without restriction is a central tenet of liberalism. We find what is perhaps the most categorical assertion of this principle in the First Amendment of the US Constitution:

Congress *shall make no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances [emphasis added].

Reality is in fact more nuanced, as free speech, like any other right, is not absolute. While this is almost a truism that nobody would contest, sharp controversies arise when it comes to actually deciding where the boundaries lie.

Against this backdrop, the issue of religious feelings has lately assumed a particularly problematic connotation across Europe – especially in connection

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with gruesome episodes linked to the perceived defamation of Islam. Just to mention the most striking cases, we recall the outburst of violence worldwide that followed the publication of the Danish cartoons of the Prophet Mohammad in 2006<sup>1</sup> and the release of the short movie *The Innocence of Muslims*, perceived as denigrating the Prophet, in 2012;<sup>2</sup> the 2015 massacre of the editorial board of the French magazine *Charlie Hebdo*, once again due to the caricatures of Muhammad;<sup>3</sup> the beheading, in 2020, of French teacher Samuel Paty, guilty of showing one of the Charlie Hebdo cartoons in class;<sup>4</sup> and the case of Mila Orriols, who was forced into hiding, when she was just 16, by death threats triggered by her social media attack on Islam for its homophobic and chauvinist tenets.<sup>5</sup>

While these episodes raise, *in primis*, questions of security, terrorism prevention and integration,<sup>6</sup> they have also triggered a debate on whether European authorities should take legal measures to avoid defamation of religions and religious feelings. There are indeed two main ways to censure expressions that are offensive to religious dogmata and symbols. One is the classical concept of ‘blasphemy’ or ‘vilification of religion’, which casts the abstract creed as the thing to be protected from injurious attacks. A more updated iteration consists in shifting the focus from the faith to believers, construing blasphemy as a violation of the latter’s rights – in particular, of their alleged entitlement not to have their religious sensibilities hurt. In one form or the other, blasphemy laws are still present in many countries worldwide – including in the West.<sup>7</sup>

This article will examine whether blasphemy laws may have a place in a secular, liberal democracy. After a theoretical introduction on free speech, its function in a liberal society and the possible grounds for restrictions, I will focus on the case study of the Italian criminal provision against defamation of religion. Italy constitutes indeed the ‘prototypical case’<sup>8</sup> of a country that has experimented with diverse ways of outlawing blasphemy – at first paying homage to the ‘religion

<sup>1</sup> *Muslim Cartoon Fury Claims Lives*, BBC (2 Jun. 2006), <http://news.bbc.co.uk/2/hi/4684652.stm>.

<sup>2</sup> *Seven Dead as Anti-Islam Film Protests Widen*, BBC (14 Sep. 2012), <https://www.bbc.com/news/world-africa-19602177>.

<sup>3</sup> *Charlie Hebdo Attack: Three Days of Terror*, BBC (14 Jan. 2015), s. Europe, <https://www.bbc.com/news/world-europe-30708237>.

<sup>4</sup> *French Police Detain Seven over Beheading of Teacher Samuel Paty*, France 24 (13 Jan. 2021), <https://www.france24.com/en/france/20210113-french-police-detain-7-over-beheading-of-teacher-samuel-paty>.

<sup>5</sup> Matteo Battaglia & Charlotte Herzog, *L'affaire Mila expliquée : insultes contre l'islam, menaces contre une lycéenne et réaction politique « maladroite »*, Le Monde.fr (29 Jan. 2020), [https://www.lemonde.fr/societe/article/2020/01/29/affaire-mila-la-ministre-de-la-justice-accusee-de-vouloir-legitimer-le-blaspheme\\_6027715\\_3224.html](https://www.lemonde.fr/societe/article/2020/01/29/affaire-mila-la-ministre-de-la-justice-accusee-de-vouloir-legitimer-le-blaspheme_6027715_3224.html).

<sup>6</sup> Tommaso Virgili, *Whose 'Identity'? Multiculturalism vs. Integration in Europe*, 19(1) Eur. View 45–53 (2020).

<sup>7</sup> *Blasphemy Laws by Country*, End Blasphemy Laws, <https://end-blasphemy-laws.org/countries/> (accessed 25 Oct. 2021).

<sup>8</sup> Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 Am. J. Comp. L., Legal Studies Research Paper n. 901700, 142 (2005).

of the state', then extending the criminal ban to all religions in an approach based on non-discrimination, and finally ostensibly shifting the focus from abstract religions to believers' rights.

By examining the legislative text and the connected jurisprudence, I will show that blasphemy laws, in whatever form, remain a testament to a past where religion was a sacred monument, but they are hardly justifiable today from a constitutional or even logical perspective. The privilege enjoyed by stronger religious denominations, the discrimination between different expressions of individual conscience, the chilling effect on free speech in the name of dogmas – these are all issues of serious concern inextricably linked to blasphemy laws that are intolerable in secular, liberal democratic societies.

## 2 A THEORETICAL INTRODUCTION TO FREE SPEECH

Before trying to assess what the acceptable limitations on freedom of expression are and whether deference for religion may be among those, it is necessary to frame this issue against the backdrop of the main theoretical lines of the legal debate on free speech in an open society.

The first bone of contention is the one between an 'individualistic' and a 'functionalist' conception of the right at issue. The 'functionalist' theory assumes that freedom of speech is to be protected insofar as it is philosophically demonstrable and empirically demonstrated that it brings beneficial effects to society. From a utilitarian perspective, the dialectical process opened by free speech makes all views compete with each other in the 'marketplace of ideas',<sup>9</sup> thus allowing the selection of the best ones.<sup>10</sup> From a democratic perspective, freedom of expression is both a precondition and a litmus test for a democratic order,<sup>11</sup> for multiple reasons: first, free speech enables individuals to engage in the public forum; second, it is the only viable procedure to reach political consensus and curb corruption, ineptitude and authoritarian tendencies; and last but not least, it is a relief valve – the only means of guaranteeing the stability of a system that otherwise could sooner or later explode like a pressure cooker.<sup>12</sup> Going a step beyond, if free speech is a function of a democratic system, it may be legitimately restricted whenever it might imperil such a model.<sup>13</sup>

<sup>9</sup> *Abrams v. United States*, 250 U.S. 616 (1919).

<sup>10</sup> Elettra Stradella, *La Libertà Di Espressione Politico-Simbolica e i Suoi Limiti: Tra Teorie e «prassi»* 274 (Torino: Giappichelli 2008).

<sup>11</sup> Alfonso Di Giovine, *I confini della libertà di manifestazione del pensiero: linee di riflessione teorica e profili di diritto comparato come premesse a uno studio sui reati d'opinione* 17 (Torino: Giuffrè 1988).

<sup>12</sup> Rodney A. A. Smolla, *Free Speech in an Open Society* 12 (New York: Knopf Doubleday Publishing Group 1993).

<sup>13</sup> Stradella, *supra* n. 10, at 121.

Conversely, the other conception, defined as ‘individualistic’, is based on the postulate whereby the freedom to express oneself is an immediate reflection of the innate, natural liberty of individuals, which is embodied not only in the intimate and formative moment of thought but also in the thought’s expression,<sup>14</sup> as an instance of self-fulfilment, autonomy and human dignity.<sup>15</sup> Within this framework, considerations based on the beneficial or nefarious consequences for society are irrelevant: freedom of expression is not a means to an end, but an end in itself.<sup>16</sup> Consequently, speech is free *in re ipsa*, for the simple reason that no group or state have any right to restrict it. To quote Justice Marshall of the United States Supreme Court:

The First Amendment serves not only the needs of the polity, but also those of the human spirit – a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual’s worth and dignity.<sup>17</sup>

It would certainly be misleading to overemphasize the preceding theoretical dichotomy.<sup>18</sup> It is sufficient to say that one of the main champions of classical liberalism, John Stuart Mill, was also a utilitarian, as he endorsed a functionalist notion of free speech that frowned upon censorship on the grounds that silencing an opinion impedes the revelation of the truth or the contestation of the error contained therein, thus inhibiting social progress.<sup>19</sup> And even in the overall liberal jurisprudence of the US Supreme Court, the instrumental conception has historically prevailed over the individualistic one.<sup>20</sup>

An equally misleading approach would be to oversimplify this debate as a controversy between a ‘relativistic’ and an ‘absolutistic’ approach to free speech. In theoretical terms, the strictly ‘absolutist’ approach is the one that rejects any possible speech limitation on the grounds that starting to erect boundaries, even for apparently good reasons, means being on the slippery slope to censorship and tyranny. This view is mostly evident in the US, and it descends directly from the letter of the First Amendment: ‘The Congress *shall make no law* [ ... ] abridging the freedom of speech’.<sup>21</sup>

<sup>14</sup> ‘Once the inviolable primacy of freedom of thought is accepted, the preferred position of freedom of speech follows’. Smolla, *supra* n. 12, at 11.

<sup>15</sup> Lee C. Bollinger & Geoffrey R. Stone, *Eternally Vigilant: Free Speech in the Modern Era* 23 (Chicago: Univ of Chicago Pr 2002); Smolla, *supra* n. 12, at 9.

<sup>16</sup> Smolla, *supra* n. 12, at 9.

<sup>17</sup> *Procunier v. Martinez*, 416 U.S. 396 (1974).

<sup>18</sup> Giovine, *supra* n. 11, at 96.

<sup>19</sup> John Stuart Mill, *On Liberty, Rethinking the Western Tradition* 87 (David Bromwich, George Kateb & Jean Bethke Elshtain eds, New Haven: Yale University Press 2003).

<sup>20</sup> Bollinger & Stone, *supra* n. 15, at 121.

<sup>21</sup> Smolla, *supra* n. 12, at 23.

De facto, every legal order, including the US one, imposes limits and exceptions on free speech, which, like any other right, may be required to pass the balancing test when confronted with contrasting protected interests. This does not mean, on the other hand, that legislators and judges are free to facilely tip the scales toward vague and collective values such as 'public interest', 'public morals', 'public order' and so on, for that would deny the status of free speech as a pillar of a democratic order – which is, in fact, what autocratic regimes do to maintain a simulacrum of constitutionalism while emptying its substance.<sup>22</sup>

In sum, a dogmatic contraposition between an 'individualistic' and a 'functionalist' conception of freedom of expression would be artificial, both on the philosophical and on the empirical levels. On the other hand, it is undeniable that a purely instrumental protection of free speech only serves the interests of the state, however democratic, and it can thus easily find itself careening toward a collectivistic and potential liberticidal slope, if it is not tempered by adamant respect for individual rights.

Some have decried the individualist conception as 'hedonistic', in that it merely satisfies selfish, or at least egotistical, personal gratification. Hence, just like the government legitimately limits multiple human activities aimed at pure individual pleasure (drug consumption or prostitution, for instance), it could also legitimately limit freedom of expression.<sup>23</sup> Two different objections are called for here. First, as this criticism is based on an ethical argument, it cannot overlook the ethical difference between the freedom of purchasing sex and the freedom of expressing one's spirit, feelings and thoughts. To account for the gulf that separates the two, we can recall that 'the words "pleasure" and "gratification" emphasize those aspects of life that human beings and animals have in common; the term "self-fulfillment" emphasizes those aspects of human life that distinguish human beings from other species'.<sup>24</sup> But the most organically liberal objection is that, as a rule, the state should refrain as much as possible from interfering with *whatever* aspect of human life and bear the burden of proving the need to do so in exceptional circumstances. For the purposes of this article, it is apposite to reiterate that the will of a majority or of a vocal group do *not* count as valid justifications, unless *concrete* damage to a legally protected interest occurs.

This leads me to address an additional point of the free speech debate. If the disquisition between 'individualism' and 'functionalism' may appear as somehow

<sup>22</sup> This is, for instance, the fate of 'heretics' in Egypt and Tunisia, punished in that their religious or non-religious views allegedly endanger 'public order' and 'public morals'. See Tommaso Virgili, *Islam, Constitutional Law and Human Rights: Sexual Minorities And Freethinkers in Egypt And Tunisia* (Abingdon, New York: Routledge 2021).

<sup>23</sup> Smolla, *supra* n. 12, at 9.

<sup>24</sup> *Ibid.*, at 10.

theoretical, a much more concrete issue concerns objects and modes of restrictions and in particular their connection to the *content* or to the *context* of the expression.<sup>25</sup> The first approach, unquestionably less liberal, permits restricting free speech based on its mere content, the 'bad idea', regardless of the concrete, empirically appreciable capacity of it to cause actual damage.<sup>26</sup> Conversely, the second approach requires a 'concrete danger' wreaked by the expression in the specific context in order for restrictions to be justified. This is the theoretical foundation of Justice Holmes' memorable 'clear and present danger' doctrine<sup>27</sup> later embraced by other fora such as the European Court of Human Rights<sup>28</sup> and even made stricter in the US with the requirement for an 'imminent' danger.<sup>29</sup>

Another important differentiation, only partially overlapping with the previous one, is the distinction between a 'content-based' and a 'content-neutral' regulation of speech. In this case, the focus is on whether restrictions are grounded on the *content* of a given message ('it is forbidden to distribute leaflets against the war'), or on the *means* of propagation of any message ('it is forbidden to distribute leaflets in public spaces'). The first option is, once again, the least liberal and most treacherous one, insofar as it leaves those in power with the freedom to authoritatively decide which ideas are to be removed from the public debate; conversely, the second option does not discriminate between ideas but merely regulates their transmission.<sup>30</sup>

In sum, all laws affecting the content of expressions rather than the context or means of transmission must be more severely scrutinized against the constitutional guarantee of free speech, and it seems entirely logical to endorse the Supreme Court's presumption of unconstitutionality in those cases, rather than engaging in a balancing test weighting freedom of expression against competing interests.<sup>31</sup>

State neutrality vis-à-vis expressions of one's thought and conscience is especially relevant for the topic of this article as it is a core feature of the principle of secularity, broadly understood.<sup>32</sup> According to this principle, the state must refrain from interfering with the inner convictions of a person and relinquish its tendency to proclaim itself the herald of truth.<sup>33</sup> Clearly, this reasoning does not imply a nihilistic relativism whereby no values is worth protecting and everything should be left exposed to power

<sup>25</sup> Stradella, *supra* n. 10, at 128.

<sup>26</sup> Bollinger & Stone, *supra* n. 15, at 8. This approach is now considered incompatible with the First Amendment.

<sup>27</sup> *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>28</sup> Stradella, *supra* n. 10, at 128.

<sup>29</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>30</sup> Bollinger & Stone, *supra* n. 15, at 19.

<sup>31</sup> *Ibid.*, at 22.

<sup>32</sup> Stradella, *supra* n. 10, at 189.

<sup>33</sup> *Ibid.*, at 191.

relations and to the law of the strongest. In fact, this would be the antithesis of the principle of secularity, whose rationale is to protect pluralism against all sorts of dogmatism. It means, however, that as long as the framework of liberalism is protected, so that everyone's hand stops where the other's nose begins, the state has no right to impose its gospel, let alone to prevent someone from contesting it.

In the next section, through the Italian case, it will be demonstrated that blasphemy laws, even when disguised as an alleged protection of believers, contain all the detrimental characteristics seen above: they constitute dogmatic and discriminatory content-based restrictions that radically deny the principle of secularity and are in place for undefined and undemonstrated interests of state and communities against the individual.

### 3 ITALY: A CASE STUDY OF BLASPHEMY

The Italian case is particularly emblematic as far as the point of this article is concerned – namely, the alleged protection of believers is just a blasphemy law in disguise, which should have no place in a liberal, secular order.

Until 2006, the Italian Penal Code contained a typical blasphemy law that criminalized the 'vilification of the state religion'. Article 402 provided that 'Anyone who publicly defames the state religion is to be punished with imprisonment for up to one year'.<sup>34</sup> Already hit by a declaration of unconstitutionality in 2000 for discriminating between creeds,<sup>35</sup> the article was eventually abrogated by Law 85/2006. In its place, Article 403 now punishes the 'public offence to a religious denomination through vilification of its adherents' with a fine. The fine is higher when the defamation is directed against a 'religious minister'.

#### 3.1 ASSESSING THE OBJECT OF THE LAW

Let us begin with the textual analysis of Article 403: on a practical level, is there really a difference between 'vilification of religion' and 'offence to a religious denomination through vilification of its adherents'? It is quite difficult to imagine how believers would be vilified if not by scorning the religion they follow.<sup>36</sup> In fact, the object of protection and the causal direction of the law are quite obscure: is the offence to a religion that causes the vilification of its adherents, or the

<sup>34</sup> English translation provided in Cristiana Cianitto, *The Blasphemy Offence in the Italian Legal System*, in *Blasphemy and Freedom of Expression: Comparative, Theoretical and Historical Reflections After the Charlie Hebdo Massacre* 344 (Jeroen Temperman & András Koltay eds, Cambridge University Press 2017).

<sup>35</sup> Corte Costituzionale, 508/2000.

<sup>36</sup> Angelo Licastro, *Il 'nuovo' volto delle norme penali a tutela del sentimento religioso nella cornice dei così detti 'reati di opinione'*, *Stato, Chiese e pluralismo confessionale*, 57 (27 Jan. 2020).



vilification of the latter that offends religion? In other words, does the provision aim to protect the religion, just like its abrogated predecessor, or the believers? And, in the latter case, individual believers or believers as an abstract group?

Starting with the first hypothesis, some scholars argue that religions are ‘patrimony of civilization’ (*beni di civiltà*) that are worth protecting as such.<sup>37</sup> Against this claim, it has been argued that religions are many and diverse in the values they promote; hence it would be contradictory to commend them all because of their alleged contribution to ‘civilization’.<sup>38</sup> While I certainly share this objection, I argue that an even more compelling one is the following: do religions, as abstract systems of tenets, actually need *protection*? Are they so weak that some derogatory words or satirical pictures may actually threaten their *existence*? Or should their *honour* be protected? The first hypothesis must be discarded as obviously unrealistic: religions are not statues at risk of damage from sticks and stones; as to the second reading, this is not corroborated by either the linguistic meaning of ‘*onore*’<sup>39</sup> or its use in the Italian Penal Code,<sup>40</sup> which unequivocally applies to individuals and not to abstract concepts.

In fact, blasphemy laws, as typical crimes of opinion, do not even pretend to protect anything in concrete terms – that is, they do not aim to prevent conduct that might prove detrimental to the subject-matter of their concern: their only goal is to shield the subject-matter’s ‘sacredness, or their conceptual intangibility’.<sup>41</sup> This clearly reveals their intrinsically discriminatory nature: whatever the rationale, a specific protection for *religions*, as theistic beliefs, is intrinsically discriminatory against *non-theistic* ones. Furthermore, ‘religions’ and ‘religious denominations’ are not the same thing: a religious denomination denotes an *institutionalized* religion. Although a recent jurisprudence admits that a ‘religious denomination’ may exist *de facto*, namely without an official accord with the state and recognition by the latter, it still requires certain structural elements, such as a public statute defining its religious character or the ‘common perception that it is actually a religious denomination’.<sup>42</sup> This clearly entails a discrimination against non-religious beliefs and even against spiritual ones, as long as they are not institutionalized or are too small to enjoy public recognition. In fact, this type of discrimination is the elephant in the room that all justifications for blasphemy laws, in whatever form, fail to address convincingly.

<sup>37</sup> *Ibid.*, at 59.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Onóre*, Treccani, <https://www.treccani.it/vocabolario/onore> (accessed 6 Oct. 2021).

<sup>40</sup> Luca Bisori, *I Delitti Contro l'onore*, in *I Delitti Contro l'onore e La Libertà Individuale Trattato Di Diritto Penale. Parte Speciale* 8 3–211 (Alberto Cadoppi et al. eds, Torino: UTET giuridica 2010).

<sup>41</sup> Alessandro Spena, *Libertà Di Espressione e Reati Di Opinione*, (2/3) *Rivista Italiana Di Diritto e Procedura Penale* 718 (2007). Own translation from Italian.

<sup>42</sup> Massimo Rubechi, *La libertà religiosa nella giurisprudenza costituzionale: verso un modello italiano?*, *Cultura giuridica e diritto vivente*, 5 (3 Oct. 2020). Own translation from Italian.

Let us now consider the other option, namely that blasphemy provisions aim to protect 'religious sentiment', as the title of the criminal code section describing them is called.<sup>43</sup> The first ambiguity concerns the target of the norm, namely whose feelings are to be protected – whether those of individual believers or of an indistinct group of them. Some scholars have argued that the rationale of the 2006 reform is the protection of individuals,<sup>44</sup> which would also be in line with the pre-reform orientation of the Constitutional Court.<sup>45</sup> However, according to the Court of Cassation, the 'vilification of believers' does not require the identification of individual injured parties, insofar as the provision 'protects the religious sentiment per se', which pertains to the indeterminate group of believers.<sup>46</sup> This interpretation is corroborated by additional elements: first, Article 403 focuses on 'offence against religion', with the vilification of believers being a mere means to achieve this; second, it is prosecutable *ex officio* by the magistrate, with no need of a legal complaint to be filed by the offended persons. Hence, the most reasonable interpretation points to the protection of a *collective* religious feeling.<sup>47</sup>

This raises another issue, namely the rationale for protecting a collective sensibility. First of all, what is a 'collective sensibility'? Given that 'group' is anything but a collective noun for a conglomerate of individuals (no differently from a 'herd of sheep' or a 'shoal of fish'),<sup>48</sup> a 'collective sensibility exists only as a synthesis (actual or presumed) of an unspecified number of individual sensibilities'.<sup>49</sup> In our case, as we are not talking about a group of *identified* individuals but about an abstract community, we have to postulate theoretically that the offence to the community indirectly reflects on the members of the group. There is, though, a blatant difference between offending a person directly and offending her indirectly (and presumably) as part of a group: while the injury to her dignity, honour and reputation is concrete and perceptible in the first case, it becomes impalpable in the second.<sup>50</sup>

An additional consideration concerns the strength of the link between the individual and the group. While this is inherent and genetic as far as, say, race is concerned, to the point that an injurious slur against a race reverberates on its members without mediation, religion is significantly different for two main reasons. The first is that 'race' is a value-neutral concept: there is no intrinsic good or

<sup>43</sup> 'Dei delitti contro il sentimento religioso e contro la pietà dei defunti'.

<sup>44</sup> Cianitto, *supra* n. 34, at 346.

<sup>45</sup> Corte Costituzionale, 440/1995.

<sup>46</sup> Corte di Cassazione, 10535/2008.

<sup>47</sup> Licastro, *supra* n. 36, at 60.

<sup>48</sup> *Collective Nouns*, Grammarist, <https://grammarist.com/grammar/collective-nouns/> (accessed 8 Oct. 2021).

<sup>49</sup> Spena, *supra* n. 41, at 714.

<sup>50</sup> *Ibid.*

bad rationally inferable from 'blackness', 'whiteness', and so on; on the contrary, a religion is an ideological system of tenets, which may be questioned, criticized and even ridiculed just like any other:

In a liberal society, there is and must be a distinction between racism and religious hatred, for the simple reason that *while there can be no acceptable reason to object to "blackness" there are many good reasons to object to religion*, whether Christianity, Judaism, or Islam. Many people believe, not without historical evidence, that religion encourages intolerance and violence (how many throats have been slashed in religion's name?) and oppresses women and minorities (think of all three religions' attitude toward gays). In a liberal democratic society, religion is, like it or not, a fair target for criticism, satire and, fortunately or unfortunately, mockery and ridicule.<sup>51</sup>

Hence, even the most hateful attack against a religion cannot be regarded as a racist attack against its adherents in the same way that this inference is valid in relation to 'blackness'. Arguing the contrary means confusing a *prejudice* against a race, namely an irrational hatred against a group identified upon the genome, with a *judgement* on a religion and its dogmata.

The second fundamental difference between race and religion is that the former is part of genetic heritage, while the latter pertains to cultural heritage: in other words, whereas one cannot choose to belong to a particular race, religious affiliation is *voluntary* and can be questioned and changed over time. Hence, whilst an attack against a certain race inevitably reverberates on the members of the group in their core identity, derogatory statements against a religion should not be considered directed against the *inner self* of believers, i.e., against something they *are*, but merely against something they *believe in*, as the etymology of the word 'believers' eloquently suggests. From a secular standpoint, this is exactly the same as political affiliation: could anybody argue that harsh criticism of a political party is ultimately an abuse of its card-carrying members and sympathizers? As has been correctly remarked, it is not clear why collective interests of religious creeds should be safeguarded as if they were reflected in their individual members, whilst the same is not done with other cultural, professional or social categories, which represent their affiliates equally, or even with a higher degree of certainty.<sup>52</sup>

In other words, although individuals may certainly be targeted not only because of their ethnicity, but also because of their religion, sexual orientation, political opinions, and so on, criticizing a religion does *not* equate to attacking individual believers, the same way as condemning others' ideological convictions and political views does not imply assaulting individuals who hold those

<sup>51</sup> Randall Hansen in Tariq Modood et al., *The Danish Cartoon Affair: Free Speech, Racism, Islamism, and Integration*, 44 Int'l Migration 12 (2006). Emphasis added.

<sup>52</sup> Emanuele La Rosa, *Onore, sentimento religioso e libertà di ricerca scientifica*, Stato, Chiese e pluralismo confessionale, 23 (Oct. 2007).

convictions. Furthermore, bearing in mind the distinction between a generic creed and a ‘religious denomination’ as highlighted above, we should keep noticing the elephant in the room: ‘the religious feelings of those who do not identify with any religious denomination remain without protection’.<sup>53</sup>

In sum, the rationale, aim and object of Article 403 remain ambiguous and *prima face* discriminatory. Whatever the interpretation, it is now the moment to assess whether the compression of free speech the norm causes may be justified against the Italian Constitution.

### 3.2 ASSESSING THE AIM OF THE LAW AGAINST THE CONSTITUTIONAL FRAMEWORK

#### 3.2[a] *Article 21 and Its Limits*

Blasphemy is shaped as a crime of opinion, which means that blasphemy laws punish the communication of specific content *per se*, irrespective of: (1) the means of transmission; (2) the intent of the agent; (3) the effects it provokes.<sup>54</sup> As per the categories outlined in the theoretical introduction, they are therefore typical content-based restrictions. As such, they must be subjected to strict constitutional scrutiny.

Freedom of expression is guaranteed by Article 21 of the Italian Constitution:

‘Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication.

The press may not be subjected to any authorisation or censorship. Seizure may be permitted only by judicial order stating the reason and only for offences expressly determined by the law on the press or in case of violation of the obligation to identify the persons responsible for such offences.

In such cases, when there is absolute urgency and timely intervention of the Judiciary is not possible, a periodical may be confiscated by the criminal police, which shall immediately and in no case later than 24 hours refer the matter to the Judiciary for validation. In default of such validation in the following 24 hours, the measure shall be revoked and considered null and void.

The law may introduce general provisions for the disclosure of financial sources of periodical publications. Publications, performances, and other exhibits offensive to public morality shall be prohibited. Measures of preventive and repressive measure against such violations shall be established by law.<sup>55</sup>

<sup>53</sup> Cianitto, *supra* n. 34, at 346.

<sup>54</sup> Spena, *supra* n. 41, at 692–693.

<sup>55</sup> Official English translation available at *Constitution of the Italian Republic*, Senato della Repubblica, [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (accessed 9 Oct. 2021).

Textually, the provision is broadly formulated – its only limit being constituted by ‘public morality’. However, as argued above with reference to the US case, this does not imply that the legislator may not extend free speech limitations to other domains if those are constitutionally justified.<sup>56</sup> There are two aspects requiring examination here: first, to what extent a blasphemy law may impact on freedom of expression as guaranteed by Article 21 without rendering it meaningless; second, what are the constitutionally protected interests justifying the succumbence of free speech in the balancing test.

Regarding the protected speech, the Constitutional Court has distinguished between ‘high speech’ deserving protection and ‘low speech’ that instead, in the Court’s debatable interpretation, is not covered by Article 21 and Article 19 (guaranteeing freedom of religion). According to this view, ‘vilification’ only extends to ‘contumely, mockery and offence, so to speak, for their own sake, which constitute both an insult to believers (and therefore an injury to their personality) and an outrage to the ethical values that substantiate and nourish the religious phenomenon, objectively concerned’.<sup>57</sup> The same has been maintained by the Court of Cassation, which has ruled that ‘simplistic verbal attacks, lacking argumentative and dialectical support, and therefore gratuitous’<sup>58</sup> are not licit. Conversely, according to the Constitutional Court:

vilification cannot be confused with discussion of religious issues, whether scientific or popular, nor with criticism and refutation, even if vehemently polemic, nor with the expression of radical dissent from any concept referring to transcendent religious values in the name of immanent or positivist ideologies or others.<sup>59</sup>

Otherwise, the Court points out, it is not only freedom of expression that would be unduly limited, but freedom of religion itself: ‘It is evident, for example, that there would be no freedom to make “propaganda” for a religion, as expressly provided for and permitted by Article 19, if those who avail themselves of this right could not just as freely demonstrate its superiority over others, criticising the latter’s assumptions or dogmas’.<sup>60</sup>

However, it is not clear where the boundary lies between a ‘vehemently polemic confutation’ and a ‘simplistic verbal attack’. Would Charlie Hebdo’s rough satire fall into the first or second category? Would Mila’s vulgar slur against religions in general and Islam in particular be a ‘gratuitous offence’ ‘for its own

<sup>56</sup> Spena, *supra* n. 41, at 702.

<sup>57</sup> Corte Costituzionale, 188/1975. Own translation from Italian.

<sup>58</sup> Cit. in Fabio Basile, *A cinque anni dalla riforma dei reati in materia di religione: un commento teorico-pratico degli artt. 403, 404 e 405 c.p.*, Stato, Chiese e pluralismo confessionale, 26 (5 Sep. 2011). Own translation from Italian.

<sup>59</sup> Corte Costituzionale, *supra* n. 57.

<sup>60</sup> *Ibid.*

sake’ or rather an expression of ‘radical dissent’, motivated by objectively homophobic and chauvinist dogmas? The risk is shifting the discussion from the ground of fundamental rights to that of *bon ton*, which is not where it belongs. Anyhow, we should bear in mind that, in a liberal democratic society, criticism may have to be loud and offensive in order to be heard.<sup>61</sup>

### 3.2[b] ‘Soothing the touchy’: Religious Feelings and Freedom of Religion

The other question to address is that of the correlative right that would be infringed due to the vilification of religious feelings. The first possibility, authoritatively endorsed by the Constitutional Court, is their protection as part of freedom of religion, guaranteed by Article 19 of the Constitution. In a 1997 ruling, the Court has stated:

[T]he protection of the religious sentiment has come to take on the significance of a corollary of the constitutional right of freedom of religion, a corollary that, of course, must equally embrace the religious experience of all those who live it, in its individual and community dimension, independently of the different contents of faith of the different denominations.<sup>62</sup>

The Court omits to further explain this reasoning, somehow assuming it apodictically. ‘Corollary’ (*corollario*) is in fact a strong word, which has the same meaning in Italian as in English, namely of a logical deduction from a previously demonstrated truth.<sup>63</sup> How the protection of a *feeling* would logically follow from the protection of a *freedom* is not particularly evident, at least to this author. In any case, if this inference were correct, it should apply to all constitutional rights – for example, to freedom of political opinion, which Article 3 (non-discrimination) puts on a par with freedom of religion. We should thereby conclude that one has the right not to be hurt in their ‘political feelings’ by vehement attacks on their preferred parties – which is obviously preposterous but perfectly in line with the ‘corollary’ reasoning. The elephant is still in the room.

Another possible interpretation could be that the Court does not aim to protect feelings as such, but it assumes that defaming a religious denomination might prevent its adherents from living out their faith safely and confidently. However, this is not any more sustainable for three main reasons: first, in 1997 the Court was applying its reasoning to the ‘state religion’ – in its own words, the

<sup>61</sup> Spena, *supra* n. 41, at 721.

<sup>62</sup> Corte Costituzionale, 329/1997. Own translation from Italian.

<sup>63</sup> *Corollario*, Treccani, <https://www.treccani.it/vocabolario/corollario/> (accessed 15 Oct. 2021). *Corollary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/corollary> (accessed 15 Oct. 2021).

one representing the ‘vast majority’ of Italians<sup>64</sup>: hardly a weak and endangered minority; second, this type of correlation would require an objective demonstration in the form of a ‘clear and present danger’ (a ‘30s-Germany scenario’); and third, this scenario would actually have nothing to do with *subjective feelings*, but with the *objective* possibility to exert a *right*. It would be fallacious, in other words, to maintain that a mere expression that is subjectively perceivable as offensive by some believers could prevent them all from praying freely.<sup>65</sup>

The oddity of the ‘corollary’ reasoning becomes even more glaring when we reflect on its implications: if the protection of religious sensibilities is a core aspect of freedom of religion, a blasphemy law would not only be constitutional but even *mandatory* for the legislator, insofar as the abrogation of such a norm could result in the violation of the constitutional obligation to guarantee freedom of religion and belief.<sup>66</sup>

Even if we accepted the argument that religious feelings constitute part of freedom of religion, this would not entail that free speech must yield by default. Indeed, the Court of Cassation has denied the possibility of simply suppressing free speech in the name of ‘religious freedom’, for that would mean granting Article 19 a preferred position over Article 21 instead of ensuring the due balance between the two.<sup>67</sup> Furthermore, the Constitutional Court, although subsuming the protection of religious feelings under the umbrella of freedom of religion, has also clearly stated that Article 19 protects not only the freedom to *follow* a religion but any kind of personal attitude towards spiritual issues, including the *negation* of religion in the forms of atheism or agnosticism.<sup>68</sup> It follows that satire and criticism of a theistic faith are not only instances of free speech, but, as manifestations of negative religiosity, also of *freedom of religion* itself.<sup>69</sup> In other words, this interpretation puts the so-called ‘victim’ and the so-called ‘offender’ exactly on the same level, with both of their rights being protected by Article 19 as two different genera of the same species: there is no difference between a believer who, due to his creed, mocks or attacks the views of an atheist, and an atheist who mocks or attacks the believer’s views for the very same reason.<sup>70</sup>

<sup>64</sup> V. *infra*.

<sup>65</sup> Compare Guy Haarscher, *Rhetoric and Its Abuses: How to Oppose Liberal Democracy While Speaking Its Language*, 83(3) Chi.-Kent L. Rev. 1237 (6 Jan. 2008).

<sup>66</sup> Carmela Piemontese, *Offesa alla religione e pluralismo religioso*, in *Religione e religioni: prospettive di tutela, tutela della libertà* 230 (Giovannangelo De Francesco, Carmela Piemontese & Emma Venafro eds, Giappichelli 2007).

<sup>67</sup> Nicola Colaïanni, *Diritto di satira e libertà di religione*, Stato, Chiese e pluralismo confessionale, 9 (May 2008).

<sup>68</sup> Corte Costituzionale, 117/1979.

<sup>69</sup> Colaïanni, *supra* n. 67, at 9.

<sup>70</sup> *Ibid.*

Incidentally, this conclusion is in line with international law, by which the Italian legal order is constitutionally bound.<sup>71</sup> The Human Rights Committee – namely the body interpreting the International Covenant on Civil and Political Rights (ICCPR), which Italy, like most countries in the world, has ratified – has been clear in stating that theistic, non-theistic and atheistic beliefs are equally protected by Article 18 of the Covenant,<sup>72</sup> and that, consequently, the legal guarantees adopted by the states have to respect 'equality and non-discrimination on all grounds specified in articles 2, 3 and 26'.<sup>73</sup> It follows that every restriction of free speech must be justified by taking into account the above principle of non-discrimination: blasphemy laws, i.e., norms aimed at singling out one or more religions among all the creeds, theistic and otherwise, are therefore illegitimate:

Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.<sup>74</sup>

### 3.2[c] *'Appeasing the Strong': Religious Feelings and Public Order*

Another justification invoked to plead the case of blasphemy laws consists in viewing vilification of religion as a threat to public order. As per this argument, reasonable limits can be imposed on free speech and other individual rights in order to guarantee 'tranquillity', 'peacefulness' and 'public safety'.<sup>75</sup>

Leaving aside the (certainly important) discussion as to whether these principles enjoy constitutional status,<sup>76</sup> what does it mean, concretely, to say that blasphemy may jeopardize public order?

<sup>71</sup> Artt. 10 and 117 Italian Constitution.

<sup>72</sup> U.N. Human Rights Committee, *General Comment 22, Art. 18: The Right to Freedom of Thought, Conscience and Religion* (1994), para. 2, HRI/GEN/1/Rev.1.

<sup>73</sup> *Ibid.*, para. 8.

<sup>74</sup> U.N. Human Rights Committee, *General Comment 34, Art. 19: Freedoms of Opinion and Expression* (2011), para. 48, CCPR/C/GC/34.

<sup>75</sup> Gaetano Azzariti, *Libertà Di Manifestazione Del Pensiero e Ordinamento Democratico. Appunti*, in *Libertà Di Manifestazione Del Pensiero e Giurisprudenza Costituzionale* 250 (Alessandro Pizzorusso et al. eds, Milano: Giuffrè 2005).

<sup>76</sup> *Ibid.*, at 247.



In legal terms, as argued above, blasphemy laws pertain to the realm of the crimes of opinion, which are perfected regardless of their effects on the real world. This would rule out an interpretation of Article 403 anchored to public order. In any case, should blasphemy be interpreted as an endangerment offence and thus blasphemy laws find their rationale in the concrete perils the crime may provoke, they would conspicuously fail the clear-and-present-danger test, based as they are on a mere presupposition disconnected from reality.<sup>77</sup> There are then two theoretical possibilities left: the first consists in the irrebuttable presumption of law of an abstract danger existing *in re ipsa* in the crime of blasphemy, not to be demonstrated; the second consists in recognizing the *objective* aspect of the offence in the *subjective* perception of threat among the public opinion, expressed in the so-called 'public alarm'.<sup>78</sup> In the first case, we have a *fiction iuris*, for the presumption of law disregards the actuality of the danger. The second interpretation, instead, is inevitably linked to the subjective judgment of the beholder in appreciating the level of 'social alarm', which is, in turn, influenced by accidental factors such as the role of the mass media.<sup>79</sup>

What all these theorems have in common, is that the criminal punishment is brought forward to a moment in which there is no *clear and present* danger, but only the *potential* breach of juridical goods. In this way, the concept of 'public peace' works as an advancement and a duplication of other criminal norms.<sup>80</sup>

Undeniably, if we move from the realm of theory to real life, defamation of religion *does* occasionally give rise to nefarious consequences, including disorder, violent confrontations and even acts of terrorism. Would this make blasphemy laws justified, if their formulation were anchored to the clear and present danger parameter?

Let us begin by stating the obvious: in this scenario, not all blasphemies (and religions) were created equal. In order to identify a concrete danger, the plethora of those potentially offended by the defamation must be numerous and/or strong enough to actually pose a threat to social peace and public order. In fact, this was

<sup>77</sup> Spena, *supra* n. 41, at 728.

<sup>78</sup> Lorenzo Picotti, *Istigazione e propaganda della discriminazione razziale fra offesa dei diritti fondamentali della persona e libertà di manifestazione del pensiero*, in *Discriminazione razziale, xenofobia, odio religioso: diritti fondamentali e tutela penale* 132 (Silvio Riondato ed., Padova: CEDAM 2006).

<sup>79</sup> *Ibid.*

<sup>80</sup> 'In case the objective meaning of public peace is understood as the certainty that all legal goods protected by criminal norms are not injured, it follows that public peace will be unsettled, or, to say it better, imperiled, every time something occurs that might potentially evolve in the infringement of a penal norm. As a matter of fact, we can say that the legal good of "public peace" duplicates and *moves forward* the legal protection that *other* penal norms already grant to the safeguarded juridical goods'. Marco Orlando Mantovani, *L'oggetto tutelato nelle fattispecie penali in materia di religione*, in *Religione e religioni: prospettive di tutela, tutela della libertà* 245 (Giovannangelo De Francesco, Carmela Piemontese & Emma Venafrò eds, Giappichelli 2007). Own translation from Italian. Emphasis in the original.

the reasoning embraced by the Constitutional Court in upholding for decades the privileged treatment of Roman Catholicism:

'This is professed in the Italian State by almost all its citizens, and as such is worthy of particular criminal protection, because of the greater breadth and intensity of the social reactions naturally aroused by the offences directed against it'.<sup>81</sup>

The elephant is yet again in the room, with an evident breach of Article 3. As a scholar convincingly commented:

the unconstitutionality, in this respect, would have clearly emerged by considering a hypothesis of "crossed" vilification, which would have resulted in two different criminal sentences for a Catholic and a Jew (or a Muslim, or a member of any other religious denomination) guilty of the same conduct; not to mention the lack of protection for the feelings of the atheist, who would have been convicted, while his counterpart would have been acquitted despite injuring the atheist's negative religious convictions.<sup>82</sup>

Later on, however, the Constitutional Court came to reject the majority argument, explicitly overruling the 'quantitative criterion' and arguing that what matters for the protection of religious sentiment is not the number of believers, but the protection of the conscience of any individual who follows a religion whatsoever.<sup>83</sup> Even more explicitly, in a ruling concerning the legitimacy of imposing a higher punishment for vilification of the 'State religion' than for the other 'admitted cults', the Court has declared such differentiation unconstitutional on the grounds that 'the greater breadth and intensity of the social reactions' is not a valid criterion to justify discriminations. Arguing the contrary, in the justices' view, would mean granting more protection to the stronger and larger groups, thus leaving minorities prey to the 'erratic and unpredictable moods of society'. This would constitute a fundamental contradiction, in that the *raison d'être* of the principle of equality is the protection of minorities against discrimination and against the whims of the majority.<sup>84</sup>

This very reasoning eventually led the Court to declare Article 402, on the 'vilification of the religion of the State', unconstitutional:

By virtue of the fundamental principles of the equality of all citizens without distinction of religion (Article 3 of the Constitution) and of the equal freedom before the law of all religious denominations (Article 8 of the Constitution), the State's attitude can only be one of equidistance and impartiality between the latter, without any relevance whatsoever to the quantitative data of the more or less widespread adherence to this or that religious denomination (judgments no. 925 of 1988, 440 of 1995 and 329 of 1997) and the greater or lesser extent of the social reactions that may follow the violation of the rights of one or another of

<sup>81</sup> Corte Costituzionale, 79/1958. Own translation from Italian.

<sup>82</sup> Marco Croce, *La libertà religiosa nella giurisprudenza costituzionale*, (2) Diritto pubblico 395 (2006). Own translation from Italian.

<sup>83</sup> Corte Costituzionale, *supra* n. 45.

<sup>84</sup> Corte Costituzionale, *supra* n. 62.

them (judgment no 329 of 1997). The conscience of each person who recognizes herself in a faith, whatever the confession to which she belongs, must be equally protected.<sup>85</sup>

In other words, the Constitutional Court finally came to recognize that subordinating the protection of the minorities to the law of the strongest would contradict the constitutional mission, which consists in limiting the democratic, majoritarian principle with guarantees for individuals and minorities.

This reasoning, albeit based on a *quantitative* concept of ‘force’ (the strength of numbers), is equally applicable to a *qualitative* meaning of force (the strength of punches). To exemplify: according to statistics,<sup>86</sup> there is almost the same number of Muslims and Orthodox Christians in Italy; as experience suggests that one may reasonably expect a stronger reaction to perceived offences against Muhammad from the former than against a Russian saint from the latter, should a judge for this very reason exert a stricter scrutiny in a case affecting Muhammad than in one affecting the Russian saint? Or wouldn’t that mean discriminating against the Orthodox minority? If we replace Orthodox Christians with Catholics in the equation, the reasoning is unlikely to change, despite Catholics being the majority. Should then a judge offer more protection to the feelings of a minority than to those of the majority, if ‘societal reactions’ are expected to be stronger?

It seems so, according to the jurisprudence, both national<sup>87</sup> and supranational,<sup>88</sup> which attaches importance to the argument of ‘social peace’ in blasphemy cases. The underlying assumption is that:

criticism towards the largest religions has to be more strict and rigorous, given the graver and violent reactions that it can provoke.[ ... ] Therefore, contrary to the principle whereby freedom of expression, including satire, requires protection all the more when it provokes reactions in society, an increasingly popular opinion maintains that a greater danger for civil society justifies a stricter judicial scrutiny on the caution employed by the agent in criticizing and mocking the beliefs of those belonging to large groups (such as the Catholic Church or Islam).<sup>89</sup>

Thus, if *some* members of a religious community are particularly numerous, vocal, violent, politically organized and supported by powerful actors (including foreign governments) and can thus stir social unrest, then the ‘believers’ sensitivity’ is considered unacceptably injured, while similar attacks against less powerful beliefs will not meet the same consideration. In other words, the crime exists at a juridical level only if troubles may arise at the social one, and this typically happens if those

<sup>85</sup> Corte Costituzionale, *supra* n. 35. Own translation from Italian.

<sup>86</sup> *Le pratiche religiose in Italia*, Italia in dati (17 May 2019), <https://italiaindati.com/le-religioni-in-italia/>.

<sup>87</sup> See Colaïanni, *supra* n. 67, at 23.

<sup>88</sup> For example, at the European Court of Human Rights. See Tommaso Virgili, *The European Court of Human Rights and Free-Speech Schizophrenia*, The Legal Project (12 Aug. 2012), <http://www.legal-project.org/2885/the-european-court-of-human-rights-and-free>.

<sup>89</sup> Colaïanni, *supra* n. 67, at 23. Own translation from Italian.

allegedly offended are numerous, politically strong and/or prone to violence. The clear *a contrario* implication is that no problem, and no crime, arises with less dangerous and smaller groups, which require no such caution. At the legal level, this kind of free speech restriction is not based on a juridical rationale that is applied to all citizens under the principle of equality, but on the 'law of the strongest' (a quintessentially anti-legal criterion). At the social level, this also constitutes a de facto encouragement for groups to resort to disruptive means in order to obtain a legal goal.

On the other hand, a non-discriminatory solution would not be any better: the pluralistic nature of modern societies – with their kaleidoscope of diverse beliefs, and the respective social taboos – makes it impossible, and for sure not desirable, to expand the concept of 'defamation' so as to cover any possible category of groups and their convictions. In the words of the Supreme Court of the United States, 'it is not a sufficient answer to say that "sacrilegious" is definite, because all subjects that in any way might be interpreted as offending the religious beliefs of any one of the 300 sects of the United States are banned in New York'.<sup>90</sup> We have not liberated ourselves from the chains of the tyranny of the majority just to come to be bound by those of minorities.

How poor the world would be if it were forbidden to say anything that could risk offending any category of people! If a multicultural society were to embrace the taboos of all the groups that make it up, we would end up having very little to talk about.<sup>91</sup>

#### 4 CONCLUSIONS: IT IS HIGH TIME TO SEE THE ELEPHANT IN THE ROOM

The concept of 'defamation' or 'vilification' of religion, aka 'blasphemy', has been steadily declining in Western liberal democracies, appearing somehow outmoded to the conscience of increasingly secular societies. Not content with being quietly consigned to oblivion, blasphemy has however hit back, chameleonicly adapting to the spirit of the times by putting on the more fashionable clothes of the 'offence to believers' feelings':

The problem, then, is not that "God" is insulted (which was the original definition of blasphemy), but that certain individuals are (supposed to be) hurt in their religious feelings, which prevents them from exercising their right to freedom of religion. The translation works in the following way: the opposition between the individual and the order of God becomes a conflict between rights – between freedom of expression and freedom of religion.<sup>92</sup>

<sup>90</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

<sup>91</sup> Ralf Dahrendorf, cit. in Spena, *supra* n. 41, at 716. Own translation from Italian.

<sup>92</sup> Haarscher, *supra* n. 65, at 1237.

In this way ‘the rhetoric of the censor is transformed into an argument about human rights’.<sup>93</sup> But whose rights are we talking about? Certainly not those of atheists or adherents to non-institutionalized creeds – let alone of anyone whose most precious feelings are not stored in the spiritual realm.<sup>94</sup> The very phrase ‘believers’ feeling’ is discriminatory: everybody believes in something, and everybody has feelings; religious ones should have no special place. This patent discrimination, what I have been calling ‘the elephant in the room’, should be enough to show that the ‘protection of believers’ sensibilities’ does nothing but confirm the privileged status of institutionalized religions; as such, it is just good old blasphemous libel in disguise, with God still comfortably seated on his throne.

From the perspective of the principle of legality, this twist makes things perhaps even worse: while a law against the ‘vilification of religion’, however despicable, at least has the merit of identifying a clear object of protection and a somehow foreseeable form of illicit conduct, the concept of ‘believers’ sensibilities’ is built on the sands of *subjective* perceptions, either presumed or voiced by loud individuals and then subsumed under the artificial ‘collective conscience’ of groups belonging to powerful religious denominations. As to those outside that sacred precinct, sticks and stones may break their bones.

The result is that a fundamental and concrete individual right, such as free speech, is suppressed in the name of an impalpable collective sensitivity that is de facto the expression of dominant values, discretionally evaluated case by case by prosecutors and judges. This radically collides with the principle of secularity, which demands state neutrality on moral issues and equal respect of all minorities – or better, of all individuals.

Indeed, what a liberal democracy is all about is *individual* rights. A group takes on relevance as a conglomerate of individuals and not as an entity superior to them. Hence, the protection of a group makes sense if it is possible to identify a fundamental right attached to its individual components. As I have attempted to show, the right in question in our case is *not* freedom of religion: satire, criticism and slurs do not prevent anyone from believing in and worshipping their favourite deity, prophet, saint, book or sacred stone. Nor does the concept of ‘honour’ apply here: the laws against libel, slander and defamation aim to protect personal reputation, not abstract systems of belief. As to non-individual protected interests such as public order and social peace, their use in this case represents an outright reverse of the rule of law: instead of opposing the perpetrators of unlawful unrests,

<sup>93</sup> *Ibid.*, at 1238.

<sup>94</sup> This point is correctly raised by Hansen in relation to the burning of Danish flags after the publication of the caricatures of Muhammad, with ‘the protestors demanding respect for religious symbols that matter to them but showing none for the national symbols of others’. Hansen in Modood et al., *supra* n. 51, at 10.

the state puts the blame on those who have exerted their constitutional right to free speech as if they had 'incited' such a disruption.

The Italian case is emblematic of the many problematic issues connected to blasphemy. Under the pressure of the Constitutional Court, the Italian legislature has attempted to repaint the crumbling wall of the 'vilification to the religion of the state' by creating a hybrid system that is supposedly centred on believers but does not forfeit the reference to religious denominations. In this way, the law fails to identify a clear object of protection – be it religions, individual believers or collective groups – and perpetuates the discrimination against non-theistic and minoritarian creeds. The *ratio legis* also remains ambiguous, and this impedes a thorough assessment of the law in light of the constitutional guarantee of free speech: if the provision aims to protect the abstract sanctity of religions, it conspicuously violates the principle of secularity and non-discrimination; if it aims to protect feelings, whether individual or collective, it fails to anchor them to a constitutionally protected right – freedom of religion not being a convincing explanation – and to justify the discrimination against non-religious feelings; if it aims to protect public order and social peace, it is nothing more than a capitulation to blackmail by powerful groups due to their threat of unrest and violence.

In sum, blasphemy laws create legal taboos with no apparent justification in a secular democracy. They stand in stark contrast to human rights and fundamental freedoms, arbitrarily selecting one of the many values prevalent in society and making it an inviolable and undisputed absolute.

If we agree on the minimal stance that all individuals are equal in dignity, it follows that it is up to each individual to determine the values upon which he or she lives, and equally up to the individual to decide which thoughts are worth expressing in the public arena. The only justification for restrictions and prohibitions is to prevent harm to fellow citizens, who enjoy the same rights. Neither the state nor any other authority – namely other individuals with greater power – have the right to impose a collective, overarching worldview, and they must only act as self-restrained guarantors of the liberal framework.

In this framework, religion certainly plays a fundamental, even crucial, role in the lives of many, but no differently from the role played in the life of others by an ideal, a party that represents that ideal, the homeland, liberty, equality and so on. Religious martyrs are not the sole ones the world has known. Civil fervour for secular ideals can be equally if not more profound, as these ardent words by Rodney Smolla testify:

We cherish the flag not because it represents "sovereignty", that crass and grasping pursuit of officialdom, but because it represents our collective *identity*, that deeper affiliation that transcends governments, and that embodies our connexions as a people.

But if the flag represents our national identity, what is that identity? What is its contour and texture and form? In the United States, that identity is, above all else, the concept of

rights. Neither sovereignty nor democracy makes us unique in world history. All nations have claimed sovereignty since nations began, and democracy was over two thousand years old when our Constitution was founded. But in our concept of rights we are special. That is our gift to human history. However imperfect, inconsistent, or hypocritical we may at times be, we have managed, over two centuries, to adhere to the extraordinary conviction that individual liberty should triumph over collective conformity.<sup>95</sup>

And yet, the profound feelings connected to the flag as a symbol of identity, history and values have not prevented the Supreme Court from covering flag burning under the First Amendment, and the author of this piece from approving of this decision.

Why should *religious* feelings be on a pedestal? The question is neither rhetorical nor provocative but has to do with the very essence of freedom in general, and of freedom of expression in particular, in a world that is plural by definition, in that it is made up of individuals who are not cells of a single organism, thinking with a single brain and a single heart, living and dying for the same ideals and values.

Replacing a concept based on offence to the person with one that sees that offence realized through contempt for the ideals and values of that person means either bidding farewell to freedom of expression or recognizing first-class and second-class values, the former protected in well-entrenched ivory towers, and the latter thrown into the brutal arena of the marketplace of ideas.

Freedom of expression is not sweet nectar; it can be hard to swallow. To use the famous quote of the European Court of Human Rights – all too often forgotten within its own walls – free speech is not supposed to just quietly follow the stream of the river but also to oppose that stream and thus disturb, shock or offend.<sup>96</sup> It confronts individuals with what they find unacceptable and inconceivable. It can hurt, scandalize and be rude.

Yet all of this is part of its essence and serves its mission, both for the individual and society: without sharp teeth, free speech would not be the watchdog of democracy but just the puppy of the powerful – be they members of the government, the majority or a minority group. Freedom of expression, in this form, is a natural derivative of the innate freedom of every human being, and a necessary precondition for the enjoyment of it.

‘I disapprove of what you say, but I will defend to the death your right to say it’. It wasn’t actually Voltaire who wrote this, but he should have.

<sup>95</sup> Smolla, *supra* n. 12, at 95. Emphasis in the original.

<sup>96</sup> Handyside v. United Kingdom, No. 5493/72 (European Court of Human Rights 7 Dec. 1976).